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No. 86-1255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

OLYMPIA EQUIPMENT LEASING COMPANY, ALFCO TELECOMMUNICATIONS COMPANY and PAULA JEANNE FELDMAN, as Personal Representative of the ESTATE OF ABRAHAM FELDMAN,

Petitioners,

v.

THE WESTERN UNION TELEGRAPH COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

Edward L. Foote
Robert G. Foster
David S. Acker
R. Mark McCareins
WINSTON & STRAWN
One First National Plaza
Suite 5000
Chicago, Illinois 60603
(312) 558-5600

Andrew C. Hartzell, Jr.
(Counsel of Record)
Michael E. Wiles
Edwin G. Schallert
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, New York 10022
(212) 909-6000

Attorneys for Respondent

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4 pp

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Respondent The Western Union Telegraph Company ("Western Union") submits this supplemental brief to address certain points raised in the Brief of the *Amici Curiae* States ("Br."), received after the filing of Western Union's Brief in Opposition.

The amici's brief is replete with characterizations of the facts that have no record support. For example, the FCC required Western Union to open the telex terminal market to competition by permitting "interconnection" to its access lines; Western Union did so. (App. A at 3; *Western Union Telegraph Co.*,

24 F.C.C.2d 644, 666, 675-76 (1970)) But contrary to the amici's assertions (Br. 1, 10), the FCC never required Western Union to give a vendor list to all new customers and Western Union never committed to do so when it had excess terminals of its own to recycle. Moreover, references in later Western Union documents to "impartial referral" meant only that Western Union would not discriminate "between the vendors" (T 2844-45), not that its salesmen would refrain from pushing Western Union terminals when it had excess terminals in inventory. In short, as the Court of Appeals stated, the FCC never required Western Union to "subsidiz[e] its competitors' selling costs." (App. A at 8)

Similarly, as described in note 3 on page 6 of Western Union's Brief in Opposition, the assumption that consumer injury occurred is equally unsupportable.

Nor did Western Union ever "close[ ] the terminal market to effective competition." (Br. 10) As shown by the undisputed facts and record statistics set forth at pages 3-5 of Western Union's Brief in Opposition, vendor competition increased steadily in every year after 1973 as the number of vendors multiplied and as vendors obtained an ever increasing share of the terminal business.

The amici also err in suggesting that the Seventh Circuit's decision conflicts with *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687 (9th Cir. 1977), *vacated on other grounds*, 437 U.S. 322 (1978). In *Mt. Hood*, Greyhound had cancelled through-bus connections with Mt. Hood, revised Greyhound schedules to prevent reasonable connections, and engaged in a variety of other affirmatively obstructive tactics. 555 F.2d at 689, 690. Moreover, on appeal Greyhound did "not deny the sufficiency of the evidence to establish a violation of Sections 1 and 2 of the Sherman Act," *id.* at 688, but argued that it had antitrust immunity as a regulated carrier. The *Mt. Hood* decision therefore is not a holding on the legality of a reduction in sales assistance to a competitor and is not in conflict with the decision below.

The Brief of the *Amici Curiae* presents no reason for this Court to review the decision below, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

Edward L. Foote
Robert G. Foster
David S. Acker
R. Mark McCareins
WINSTON & STRAWN
One First National Plaza
Suite 5000
Chicago, Illinois 60603
(312) 558-5600

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